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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM CHARLES MARSHALL,

Defendants and Appellants.

B204020

(Los Angeles County  
Super. Ct. No. BA320267)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Mark S. Arnold, Judge. Affirmed.

Robert E. Boyce, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and Susan S. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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William Charles Marshall appeals from the judgment entered upon his conviction by jury of first degree murder (Pen. Code, §187, subd. (a)).<sup>1</sup> The jury also found to be true the allegation that appellant personally used a deadly or dangerous weapon (§ 12022, subd. (b)) and the special circumstance allegation that the murder was committed in the course of an attempted robbery (§ 190.2, subd. (a)(17)). The trial court sentenced appellant to prison for a term of one year plus a consecutive life sentence without the possibility of parole. Appellant contends that (1) the prosecution's pre-accusation delay violated his right to a fair trial and due process, (2) the trial court abused its discretion and deprived him of due process by admitting evidence of uncharged crimes and conduct, (3) the trial court abused its discretion in admitting evidence of appellant's poverty and need for money to purchase drugs, and (4) the errors cumulatively warrant reversal.

We affirm.

## **FACTUAL BACKGROUND**

### ***Appellant's employment***

On October 2, 1984, appellant began working as assistant manager at the Kentucky Fried Chicken restaurant on Palos Verdes Drive, in Redondo Beach (Redondo Beach KFC). Gregory Rabdau (Rabdau) was the district manager and Robin Hoynes (Hoynes), the store manager. Only appellant, Hoynes and Rabdau had the combination and keys to the safe and the keys to the restaurant. The back door employee entrance to the restaurant was supposed to remain locked at all times.

From the outset, Rabdau had problems with appellant. In the first weeks of his employment, appellant asked for salary advances and was very late for work on two occasions. After he was late the second time, Rabdau suspended him for four days. The keys to the restaurant and the safe were not taken from him during his suspension, nor was the combination to the safe changed.

On October 15 and 18, 1984, money was found missing from the Redondo Beach KFC safe. The first theft occurred while appellant was suspended. There were no signs

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

of forced entry into the restaurant or the safe. Hoynes reported the theft. On the second occasion, appellant was working the night shift, locked the restaurant at 10:00 p.m., was the first person to return the next morning and reported the theft of \$1,120. There were no signs of forced entry. Because of these thefts, the manager or assistant manager was required to put the day's money into a bank bag and make a night deposit or take the money home to deposit the next day. Redondo Beach KFC had no prior history of theft.

On October 20, 1984, Rabdau again suspended appellant, believing him to be the thief. Two days later, Rabdau changed the combination to the safe without telling appellant. On October 26, 1984, Rabdau formally terminated appellant, giving him a letter setting forth the reasons for his termination, including among others, his tardiness and the missing money. Rabdau took appellant's keys to the exterior door and to the safe and later changed the locks to the restaurant. Seeking to keep his job, appellant gave Rabdau a letter offering, among other things, to repay the previously stolen money. Rabdau took this offer as a tacit admission of guilt. Cheryl Fuller (Fuller) replaced appellant as assistant manager.

### ***Hoynes's murder***

On October 30, 1984, Fuller was scheduled to close the restaurant at 9:00 p.m. But she only worked until 4:00 p.m., as Hoynes agreed to change times with her so Fuller could attend a concert. At 7:00 p.m., Rabdau came to the restaurant to assist Hoynes with paperwork and to meet appellant. Rabdau had called appellant to arrange a meeting so appellant could pick up his briefcase and return his KFC uniforms. When Rabdau was about to leave Redondo Beach KFC, appellant had not yet arrived. Rabdau told Hoynes that appellant was supposed to come by. Before leaving, Rabdau checked that the back door was locked, dead-bolted it and left. He felt uncomfortable leaving Hoynes alone, so he sat in his car and watched the restaurant for a while. He felt like he was being watched.

Near 9:00 a.m. the next morning, Fuller arrived at Redondo Beach KFC for work. Hoynes's car was still there. The top lock on the employee door was unbolted. In the kitchen area, Fuller saw Hoynes lying on the floor with blood around her body. Her

purse had been emptied and food and other items were strewn on the floor. The police were called.

Rabdau was notified of the murder and came to the restaurant. Hoynes's body was near where she had been working. From the tabulations Hoynes had been working on when Rabdau left the previous night, he estimated that she had done 10 to 12 minutes of additional work after he left.

***Fountain Valley Kentucky Fried Chicken (Fountain Valley KFC) incidents***

On November 2, 1984, Peter Goetz (Goetz) was the manager of Fountain Valley KFC, where appellant was trained in September 1984. Goetz did not know him, as Goetz began working there after the training was complete. Near 11:00 p.m., after closing, Goetz was working alone. Appellant appeared at the drive-through window and asked Goetz for the time, though there was a clock straight ahead of him. He was wearing camouflage fatigues, a dark jacket, a knit cap, gloves and boots and carrying a blue athletic bag. Outside, appellant met John Stumbo (Stumbo), one of Goetz's employees. Appellant pushed the buzzer at the employee door. Goetz looked through the peephole, saw Stumbo and opened the door and saw appellant. Stumbo asked if appellant could use the telephone, but Goetz refused and closed the door because he recognized appellant as the person who had been fired from another KFC. The next day, Goetz reported the incident.

As a result, Detective Andrew Conahan, Jr., and Officer Leon Darley began a surveillance of appellant on November 6, 1984. They wore plainclothes and drove unmarked vehicles. They saw appellant purchasing narcotics, though they did not see him using them.

On November 10, 1984, at approximately 9:00 p.m., the surveillance team saw appellant parked in a parking lot that had a view of Fountain Valley KFC. Two males and one female were inside the closed restaurant. Though it was only 60 degrees outside, appellant was wearing camouflage pants, a dark jacket, a cap, gloves and boots, and was carrying a blue athletic bag. Appellant sat in his car, drove to other locations and then returned to Fountain Valley KFC, attempted to look in its window, left again and

eventually returned. At some point he got out of his car and walked toward the restaurant.

Detective Conahan was certain appellant was casing Fountain Valley KFC. Concerned for the safety of the people inside, the detectives decided to have appellant arrested. At 12:45 a.m., on November 11, 1984, officers arrested appellant as he exited a freeway near Los Angeles. Detective Gilbert Kranke searched his car and found a duffel bag containing a knife. During a booking search, a pocket knife with a three-inch blade and three gloves were found in appellant's pants pocket.

### ***The investigation***

#### *Crime scene investigation*

The morning Hoynes's body was discovered, Detectives Dave Crespino, Jeffrey Lancaster and his partner, Detective Kranke, responded to Redondo Beach KFC. They found her body 10 to 12 feet from the safe, with a piece of foam next to it. There were bloodstains on Hoynes's clothes, next to her left elbow, near the safe, and in several other places. But there was no blood trail between Hoynes's body and the safe.

The safe had pry marks on it and was damaged. Inside was a bank bag, containing \$700 to \$800, which should have been deposited or taken home by Hoynes the night before. Hoynes's keys to the safe and her car were never found. Appellant's briefcase and the restaurant paperwork were on the counter.

#### *Interviews*

On October 31, 1984, Detectives Lancaster, Kranke, Gary Hilton, and Jim Cook went to the residence of appellant and his girlfriend, Yvonne Williams (Williams). Appellant answered the door. When told that someone at Redondo Beach KFC was murdered, he was calm and cooperative and did not ask who. He agreed to be interviewed and went to the police station with Detectives Lancaster and Kranke. On the way to the station, Detective Lancaster noticed that appellant had a band-aid on his left index finger. He was right handed. Detectives Hilton and Cook remained at the house to wait for Williams.

At the station, appellant told detectives that at 7:00 p.m. the prior evening he was at home, went to a liquor store, returned home, and, at approximately 8:00 p.m., helped Williams prepare dinner and injured his finger cutting garlic. He ate dinner with Williams and her children, watched television and went to bed.<sup>2</sup>

Appellant gave hair and fingerprint samples, gave permission to search his part of his home and gave telephonic authorization to Williams to give detectives the clothing he wore the previous night. Appellant subsequently gave a blood sample. When asked if he had any knives, appellant showed a pocket knife, which was returned to him because it was too small to be the murder weapon. He was not arrested.

Detectives Hilton and Cook interviewed Williams when she arrived home. She told them that the night before appellant came home from work at approximately 6:30 or 7:00 p.m. She cooked spaghetti, and her children and appellant were present. Williams went to bed between 9:00 and 9:30 p.m. Appellant stayed up and watched television or played a video game. She denied that he helped to prepare dinner or cut his finger doing so, that he went to the store before she went to bed, and that she ever saw the piece of foam from the murder scene, a photograph of which was shown to her.

#### *Forensic evidence*

Dr. Margaret Greenwald, a forensic pathologist, performed an autopsy on Hoynes. It was only the third stab wound autopsy she had conducted. She concluded that Hoynes died between 10:00 p.m. on October 30, 1984, and 2:00 a.m. on October 31, 1984, from two fatal stab wounds to her back. The wounds were consistent with having been inflicted by a single-edged knife with a thin blade. Hoynes also suffered slicing wounds to her face and neck inflicted after the back wounds. She had no defensive wounds.

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<sup>2</sup> During the interview, appellant no longer had the band-aid on his finger, which he tried to keep out of view. The band-aid was later found in an ashtray in the detectives' patrol car. The cut on his finger appeared fresh.

Dr. Greenwald opined that Hoynes was likely stabbed from behind, near where she lay, because there was no blood trail. In her report, Dr. Greenwald described one of the back wounds as nine inches deep. However, after Hoynes's autopsy, Dr. Greenwald performed hundreds of knife wound autopsies and had never had one that deep. Depth can only be roughly estimated, and chest wound depth is problematical. Here, the victim was slender, suggesting less depth. Consequently, Dr. Greenwald testified that despite the nine-inch depth measurement in her report, the knife taken from appellant's duffel bag, which had a blade only five inches long, could have been used to inflict the two stab wounds.

David Sugiyama (Sugiyama), a criminalist in the Los Angeles Crime Laboratory, recovered and analyzed blood flakes from where the blade and wooden handle met on the knife taken from appellant. The blood flakes tested positive for human antigen, as did blood collected near the safe.

#### ***Cold case investigation beginning in 2004***

##### *New Forensic Evidence*

In 2004, Los Angeles Sheriff's Department Senior Criminalist John Bockrath reviewed Sugiyama's findings and subjected the blood from appellant's knife to DNA testing. No human DNA was detected. He also tested for DNA the blood collected near the safe and on floor near Hoynes's elbow. The blood was established to be Hoynes's blood. No blood found at the crime scene matched appellant's blood. No blood was found on appellant's pocket knife, clothes or shoes he wore on the night of the murder, or on the gloves or other items in appellant's possession on November 10, 1984, when he was detained by police.

In 2005, criminalist Debra Kowal (Kowal) wrote a report excluding appellant's knife as the murder weapon based upon Dr. Greenwald's depth measurements.

Steven Dowell (Dowell), a criminalist with the Los Angeles County Coroner's Department, who worked in the same laboratory as Kowal, was asked to review Kowal's report. He examined appellant's single-edged, 10 1/4-inch-long boning knife, which had a blade of 5 3/4 inches. This knife tested presumptive for human blood but produced no

DNA results. After speaking with Dr. Greenwald, Dowell discounted the finding in her report that the depth of one of the wounds was nine inches, which would eliminate appellant's knife as the possible murder weapon because it only had a blade of 5 3/4 inches. He testified that depth measurements are so unreliable that some doctors do not even take them. Dowell concluded that appellant's knife could not be excluded as the murder weapon.

In 2004, Torrance Police Detective James Wallace, a "cold case" homicide detective, became involved in this case. When he examined the evidence, he believed that there was a connection between the piece of foam found near Hoynes's body and the left boot cuff of the boots appellant was wearing at the time of his November 11, 1984, arrest.

Detective Wallace located appellant in Palm Desert, California, and Williams outside of California. He learned that they were no longer in contact with each other. On April 28, 2005, he and Detective Glass contacted appellant at his residence. There, the detectives found 15 pairs of shoes, many badly worn, in a messy closet. Detective Wallace noticed a pair of Vans shoes with thick padding at the back cuff area, which had the same pattern of wear in the collar as the boots.

A month later, Detective Wallace returned to appellant's residence with a search warrant. He found that the closet was then orderly, with shoes in a rack or shoe box. The badly worn, older shoes, including the Vans, were gone. Detective Wallace did find another pair of deck shoes which had a similar pattern of wear in the padded collar area as the Vans shoes and the boots.

Dr. Bradley, a forensic examiner and chemist for the FBI, examined the foam piece recovered from the crime scene to see if it was chemically consistent with foam in the cuff of appellant's boots. The boot foam was a polyurethane foam. While it had the same texture and color as the piece of foam recovered at the crime scene, it contained phthalates, which the loose piece of foam did not. Dr. Bradley concluded that she could not say whether or not the piece of foam came from either shoe.



Sandra Wiersema (Wiersema), a forensic examiner with the FBI, who specialized in shoes, also examined the piece of foam and the boots. The foam from the crime scene had no glue or stitching. In the left boot, the collar was completely ripped away because the stitching was gone. Wiersema concluded that the piece of foam was capable of fitting into the left boot collar. Although the boots appeared to have been manufactured with foam in the collars, neither of the boot collars had foam in them. She opined that the presence of phthalates in the foam left in the boot, and not in the foam from the crime scene, did not mean that the crime scene foam could not have come from the boots.

Dr. Lynne Herold, a forensic scientist who specialized in trace physical evidence analysis and bloodstain pattern interpretation, also examined the piece of foam and the boots. She concluded that the foam could not be excluded as having come from the boots, nor could she conclude that it did. She explained that phthalates could be present in the boot and not on the foam due to adhesives used to construct the boots or the leather-like material of the boots.

#### *Re-interviews of Williams*

On the same day that Detective Wallace visited appellant, Detectives Daniel Metzger and Denise Richie contacted Williams in her driveway, in Cleveland, Ohio. Williams lied and told them that she had suffered a head injury in 2001 and had difficulty remembering events from 1984. She nonetheless told the detectives, in a recorded interview, about a conversation she had with appellant between October 31, 1984, and November 10, 1984. At trial, she testified regarding this conversation with appellant as follows. He was “[r]anting and raving about the Bible” and told her he was not going to heaven. When she asked why, he told her about a female KFC restaurant manager who was stabbed and killed. He initially did not say who stabbed and killed her, but that after she was stabbed, “[h]e went back to the scene and slit the young lady’s throat” because if she awoke “from her original injury, . . . she could write his name in blood.” Appellant admitted, “I stabbed this young lady.” Appellant told Williams that the woman did not give up the money which was “dropped down the chute.”

Detective Metzger conducted a second recorded interview with Williams on September 21, 2005. On that occasion, she admitted lying to police in 1984 when she said that appellant was with her on the night of Hoynes's murder. Appellant had told her to say that. She also reported a second conversation she had with appellant in the days after Hoynes's murder. She testified about that conversation as follows. After police spoke with Williams on October 31, 1984, appellant asked her what the police said. She said that they had shown her a photograph of an object. Appellant asked her to describe it. When she did, appellant referred to his boot and said, "Is this what they showed you?" Williams replied, "Oh, my God. How did you get it." Appellant replied, "I didn't get it. This is the other one." He said, "What you described came out of one of my shoes, and what I'm showing you now is the other one out of the other shoe." Appellant later took foam out of his boot and threw it on the freeway. Williams said that appellant was using crack cocaine at the time of the murder.

## **DISCUSSION**

### **I. Pre-accusation delay**

#### ***A. Background***

On November 11, 1984, appellant was arrested for Hoynes's murder but was later released. An indictment was not filed until September 2006. Before trial, appellant filed a motion to dismiss for violation of due process under the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 15, of the California Constitution based upon the prosecution's delay in filing. Appellant argued that he was prejudiced because of "dimming of memories, the death or disappearance of witnesses, and the loss or destruction of material physical evidence." Appellant requested that the trial court defer ruling on the motion until after trial because "the true extent of [appellant's prejudice by delay] could only be measured after trial at which time the court will have the opportunity to determine whether material witnesses are missing or had poor memories or there was other prejudice caused by the delay, in the context of the case as a whole." The prosecutor joined in the request, which the trial court granted.

At the close of evidence, defense counsel renewed the motion, arguing that appellant was prejudiced by a loss of evidence. The prosecutor argued that appellant had suffered no prejudice. The trial court denied the motion. It found that the prosecutor had not gained any unfair tactical advantage by the delay, there was no showing that appellant suffered any material prejudice, the delay was justified by advancements in technology and the development of additional evidence, particularly Williams's testimony, and that any prejudice suffered by appellant was outweighed by the justification. The court found the claim that evidence was destroyed pure speculation.

### ***B. Contention***

Appellant contends that pre-accusation delay violated his right to a fair trial and to due process. He argues that “[t]he delay only served to weaken the defense, not because of new technologies but simply because the prosecution witnesses reevaluated their strategy and interpretations of existing evidence. The length of delay with so little justification when balanced against the prejudice violated appellant’s right to a fair trial requiring reversal.” This contention is without merit.

### ***C. Applicable principles and analysis***

“‘[T]he right of due process protects a criminal defendant’s interest in fair adjudication by preventing unjustified delays that weaken the defense through the dimming of memories, the death or disappearance of witnesses, and the loss or destruction of material physical evidence. . . . A defendant seeking to dismiss a charge on this ground must demonstrate prejudice arising from the delay. The prosecution may offer justification of the delay, and the court considering a motion to dismiss balances the harm to the defendant against the justification for the delay.’” (*People v. Nelson* (2008) 43 Cal.4th 1242, 1250; *People v. Catlin* (2001) 26 Cal.4th 81, 107; *People v. Martinez* (2000) 22 Cal.4th 750, 759, 767.) We uphold the trial court’s ruling on this claim on appeal if it is supported by substantial evidence. (*People v. Hill* (1984) 37 Cal.3d 491, 499; *People v. Mirenda* (2009) 174 Cal.App.4th 1313, 1330.)

### *1. Prejudice*

Appellant argues that he suffered prejudice because (1) memories of witnesses had faded, (2) one witness died, (3) evidence was destroyed, as the liquor store where appellant purportedly went to purchase beer on the evening of Hoynes's murder had been demolished and the Redondo Beach KFC safe was no longer available, (4) Williams changed her testimony and was no longer on good terms with appellant, and (5) Dr. Greenwald, the pathologist who conducted the autopsy, changed her opinion as to the depth of one of the fatal wounds based upon subsequently gained experience.

Whether the defendant suffered prejudice is a factual question for the trial court. We must affirm its determination that no prejudice was suffered if it is supported by substantial evidence. (*People v. Hill, supra*, 37 Cal.3d at p. 499.)

Appellant's primary focus is on alleged prejudice suffered because Williams recanted the statement she made right after the murder, that appellant was with her that night. Apart from the fact that her testimony was devastating to his defense, we fail to see how appellant was prejudiced in defending against it. Appellant had a full opportunity to cross-examine Williams, point out to the jury that she contradicted her earlier statement to police, and challenge her explanation for doing so. Williams provided great detail regarding her discussions with appellant, belying any suggestion that her memory had faded, and stated that she was absolutely positive of her recollections. All of her information regarding the murder came from appellant and from no other source.

The only witness who had died between the time of the murder and the filing of charges was Officer Keller, who had written a report regarding the October 15, 1984, theft from Redondo Beach KFC. He could therefore not testify to what Hoynes, who reported that theft, told him.<sup>3</sup> But Rabdau testified about that theft and was available for

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<sup>3</sup> It is unclear the extent to which such testimony might be inadmissible as against a hearsay objection. (Evid. Code, § 1200.)

cross-examination. There is no prejudice if the testimony of unavailable witnesses would have been cumulative. (See *Scherling v. Superior Court* (1978) 22 Cal.3d 493, 506.)

There was no loss or destruction of the physical evidence obtained at the crime scene, which was preserved for further examination years later. Appellant claims he was prejudiced by the loss of the Redondo Beach KFC safe and that the liquor store he claimed to have visited on the night of the murder no longer existed. Even if the liquor store did still exist and had a video showing that appellant was there on the evening in question, his presence there that evening would establish little, as the precise time of the murder was unknown, and Dr. Greenwald placed it in a four-hour time period. The absence of the safe was similarly insignificant, as there was substantial evidence as to its location, use and condition from several witnesses.

To the extent the People's expert witnesses changed their opinions, they were subjected to rigorous cross-examination. Dr. Greenwald was thoroughly cross-examined on her change of opinion regarding the nine-inch depth of one of Hoynes's stab wounds.

Appellant argues that because of the delay in prosecuting him, the People were able to present expert opinions to explain that the presence of phthalates in the foam in appellant's boot and not in the foam recovered at the crime scene was the result of contamination that occurred during the long storage process. The fallacy in this argument is that if the phthalates were in the foam only because of contamination over the years, then in 1984, there would have been no contamination. The foam evidence would therefore have been stronger if the case was presented then. Appellant was not prejudiced by chemical contamination which made it appear that the foam recovered at the murder scene did not match the foam in appellant's shoe.

Appellant has failed to specify in what particular respects faded memories of witnesses adversely affected his defense. We have found none.

In summary, appellant's claims of prejudice are simply claims that more favorable evidence for the prosecution was uncovered and became available over time. This is not the type of prejudice contemplated by the due process clause. Constitutional prejudice relates to the ability of the defendant to defend himself or herself, not the prosecution's

discovery of more favorable evidence. Appellant has failed to establish that his ability to defend himself was negatively impacted by the delay.

Since there is substantial evidence to support the trial court's conclusion that appellant did not suffer prejudice from the delay, we need not determine whether the delay was justified. (See *Scherling v. Superior Court*, *supra*, 22 Cal.3d at p. 506.) Nonetheless, even if there was prejudice, the delay was justified.

## *2. Justification for delay*

If the defendant meets his initial burden of showing prejudice from a pre-accusation delay for either a due process or state constitutional speedy trial claim, "the prosecution must show justification for the delay. If the prosecution does that, the trial court must balance the prejudice to the defendant resulting from the delay against the prosecution's justification for the delay. [Citation.]" (*People v. Lowe* (2007) 40 Cal.4th 937, 942; *People v. Martinez*, *supra*, 22 Cal.4th at pp. 766-767.)

In 1984, the evidence supporting appellant's guilt was, at best, equivocal. No tangible evidence connected him to the murder scene. While he had arranged to go to Redondo Beach KFC on the night of the murder, there were no witnesses as to whether he did so. Williams provided appellant an alibi, telling detectives that appellant was with her that night. Neither appellant's blood nor fingerprints were found at the crime scene. The clothes appellant claimed to have worn on the night of the murder tested negative for blood. The piece of foam found at the scene could not be identified. The blood on the knife taken from appellant when he was arrested tested positive for human antigen, but no DNA test was performed at that time. DNA testing was in its infancy and not regularly utilized. Dr. Greenwald's report indicated a depth of nine inches of one of the fatal wounds, strongly suggesting that the knife taken from appellant on the night of his arrest could not be the murder weapon.

Only after further forensic analyses, Williams's admission to detectives that she lied in 1984 about appellant's being with her on the night of the murder, and her statement to them that appellant admitted his guilt to her, did the prosecution believe it

had the critical evidence necessary to establish appellant's guilt beyond a reasonable doubt. This new evidence was unavailable to the prosecution in 1984.

The state bears a heavy burden in criminal cases to prove guilt beyond a reasonable doubt. While intentional delay aimed at disadvantaging a defendant will not be countenanced by due process, caution by the state in accusing and prosecuting suspects based upon a bona fide belief that the evidence is insufficient to meet that burden should be commended. The trial court should not second-guess the prosecution's decision regarding whether sufficient evidence exists to warrant bringing charges. “[T]he Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor’s judgment as to when to seek an indictment. . . . [P]rosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect’s guilt beyond a reasonable doubt. . . .” (*People v. Nelson, supra*, 43 Cal.4th at p. 1252.)

### *3. Balance of prejudice and justification*

“[W]hether the delay was negligent or purposeful is relevant to the balancing process. Purposeful delay to gain an advantage is totally unjustified, and a relatively weak showing of prejudice would suffice to tip the scales towards finding a due process violation. If the delay was merely negligent, a greater showing of prejudice would be required to establish a due process violation.” (*People v. Nelson, supra*, 43 Cal.4th at p. 1256.) We find nothing to suggest that the delay here was purposeful and little to suggest that it was even negligent.

Weighing the evidence available to the prosecution in 1984 convinces us that the prosecutor had substantial justification for not prosecuting until Williams's favorable testimony became available. This justification for delay far outweighed whatever minimal prejudice appellant claims to have experienced.

## **II. Admission of evidence of uncharged crimes and conduct**

### *A. Background*

The prosecution filed an in limine motion pursuant to Evidence Code section 1101, subdivision (b), seeking to introduce evidence of the two thefts at Redondo Beach

KFC, discovered on October 15 and October 18, 1984, and appellant's conduct on November 2 and 10, 1984, at Fountain Valley KFC to demonstrate identity, modus operandi, common plan or design and intent.

Appellant objected that Evidence Code section 1101, subdivision (b), did not justify admission of appellant's uncharged conduct because that conduct did not share distinctive common characteristics with the charged offense, and under Evidence Code section 352 that evidence would require the undue consumption of time, confuse the jurors, create the necessity of a mini trial, and its prejudice outweighs any probative value.

The trial court overruled appellant's objections. It found that admission of the evidence of the November incidents was "not even a close call" and that the October thefts were relevant to appellant's knowledge of where Redondo Beach KFC kept its money, to establish a common plan of his stealing from the safe, and a motive for the killing.

### ***B. Contention***

Appellant contends that the trial court abused its discretion by admitting evidence of his uncharged conduct under Evidence Code sections 1101, subdivision (b), and 352. He argues that the November 1984 incidents could not be used to show similarity with the charged crime because there was no evidence as to how the charged crime occurred. The October thefts were inadmissible to show intent because intent was not a contested issue and, in any event, there was no similarity between the prior thefts and the charged murder in the course of a robbery. Finally, appellant argues that under Evidence Code section 352, admission of the uncharged conduct has minimal relevance which is outweighed by its prejudice. Such evidence has no similarity to the murder charge and was unnecessary to prove appellant's knowledge of the location of the money because, as assistant manager, he knew where it was. This contention lacks merit.



### *C. Applicable principles*

Other crimes evidence, as a general proposition, is inadmissible to prove a defendant's disposition. (Evid. Code, § 1101, subd. (a).)<sup>4</sup> Admission of such evidence produces an "overstrong tendency to believe the accused guilty of the charge merely because he is a likely person to do such acts." (1A Wigmore, Evidence (Tillers rev. 1983) § 58.2, p. 1215.) "Any evidence of a defendant's criminal conduct, on other occasions, no matter how relevant to issues legitimately before the court, will have an inevitable tendency to suggest that the defendant has a general criminal propensity or disposition, and thus an inevitable tendency to persuade a trier that the defendant is somewhat more likely to have committed the crime currently charged." (*People v. Scott* (1980) 113 Cal.App.3d 190, 198.)

Evidence Code section 1101, subdivision (b),<sup>5</sup> however, expressly carves out an exception to this rule. It provides that such evidence is admissible if it is relevant to an issue other than disposition to commit the act. Admissibility of other misconduct evidence depends upon (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crime to prove those facts, and (3) any policy requiring exclusion, such as Evidence Code section 352. (*People v. Carpenter* (1997) 15 Cal.4th 312, 378-379; *People v. Ewoldt* (1994) 7 Cal.4th 380, 404 ["[T]o be admissible such

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<sup>4</sup> Evidence Code section 1101, subdivision (a), provides: "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

<sup>5</sup> Evidence Code section 1101, subdivision (b), provides: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

evidence [of other misconduct] ‘must not contravene other policies limiting admission, such as those contained in Evidence Code section 352. [Citations.]’”.)

We review the trial court’s Evidence Code sections 352 and 1101, subdivision (b), rulings under the abuse of discretion standard. (*People v. Lewis* (2001) 25 Cal.4th 610, 637 [Evid. Code, § 1101]; *People v. Carter* (2005) 36 Cal.4th 1114, 1147; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124 [Evid. Code, § 352].) Abuse occurs when the trial court “exceeds the bounds of reason, all of the circumstances being considered.” (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) “[I]n most instances the appellate courts will uphold [the trial court’s] exercise [of discretion] whether the [evidence] is admitted or excluded.” (*People v. Kwolek* (1995) 40 Cal.App.4th 1521, 1532.)

#### ***D. Analysis***

##### ***1. Materiality***

A “plea of not guilty puts in issue every material allegation of the accusatory pleading, except those allegations regarding previous convictions of the defendant to which an answer is required by Section 1025.” (§ 1019; see *People v. Steele* (2002) 27 Cal.4th 1230, 1243.) Murder is a specific intent crime. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1227.) Hence, appellant’s not guilty plea placed his intent and other elements of his offense in issue. Evidence of motive is relevant to establishing appellant’s intent. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1289.)

##### ***2. Probative tendency***

“In ascertaining whether evidence of other crimes has a *tendency* to prove the material fact, the court must first determine whether or not the uncharged offense serves “logically, naturally, and by reasonable inference” to establish that fact. [Citations.] The court ‘must look behind the label describing the kind of similarity or relation between the [uncharged] offense and the charged offense . . . .’” (*People v. Thompson* (1980) 27 Cal.3d 303, 316, fn. omitted, disapproved on other grounds in *People v. Rowland* (1992) 4 Cal.4th 238, 260.)

Evidence Code section 1101, subdivision (b), permits prior misconduct evidence on the issue of identity. Evidence of a common plan or scheme serves to identify

appellant as the perpetrator. “The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] ‘The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.’ [Citation.]” (*People v. Ewoldt, supra*, 7 Cal.4th at p. 403.)

Evidence Code section 1101, subdivision (b), also permits prior misconduct evidence on the issue of motive or intent. “In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant “‘probably harbor[ed] the same intent in each instance.” [Citations.]” (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402.) “The least degree of similarity between the crimes is needed to prove intent. [Citation.]” (*People v. Steele, supra*, 27 Cal.4th at p. 1244.) If prior offenses share common features with the charged offense, they can be admitted to show motive. (*People v. McDermott* (2002) 28 Cal.4th 946, 999.)

a. November incidents

The trial court’s ruling permitting admission of appellant’s other conduct into evidence on the issues of common scheme, intent and motive did not “exceed[] the bounds of reason.” (*People v. Giminez, supra*, 14 Cal.3d at p. 72.)<sup>6</sup> Though, as appellant argues, the evidence does not show the details of what occurred during Hoynes’s murder, it does not follow that the information developed regarding that crime was insufficient to relate it to the November 1984 incidents. Appellant had a past relationship with both KFC’s, having worked as assistant manager at Redondo Beach KFC and done his training at Fountain Valley KFC. In both locations, he was privy to the money handling procedures, received keys to the restaurants and safes and was provided the combinations to the safes. When he left both locations, he returned his keys, but was not told that the

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<sup>6</sup> Appellant argues that intent was not in issue. However, it was an element of the offense to which appellant pled not guilty, thereby placing it in issue. (See part IID1.)

combinations to the safes were changed, possibly causing him to believe that once inside those restaurants he would be able to gain access to them.

In addition, the November incidents occurred late in the evening after Fountain Valley KFC was closed, when only one or a few employees were present. Hoynes's murderer entered the closed Redondo Beach KFC when only Hoynes was present. In the November incidents, appellant tried to enter Fountain Valley KFC through the employee door, as it appears the Hoynes murderer did. The morning after the murder, the dead bolt on the employee door was unlocked, though it was supposed to remain locked at all times. In the November incidents, appellant was casing Fountain Valley KFC with the apparent intent to steal from it. It also appears that Hoynes was murdered in connection with an attempted robbery in Redondo Beach KFC, as its safe had blood and pry marks on it and was damaged. When appellant was detained on November 11, 1984, he had in his possession a knife which was consistent with the weapon used to kill Hoynes. The November incidents established a link between appellant and the potential murder weapon. In the Fountain Valley KFC incidents, appellant was dressed in camouflage pants, with boots and gloves and carried an athletic bag. There was evidence supporting the inference that the foam piece found at Redondo Beach KFC came from the collar of appellant's boots and that he was therefore similarly dressed. This information demonstrated sufficient commonality to establish robbery as a motive for Hoynes's murder and to link appellant to the potential murder weapon.

b. October thefts

The October thefts at Redondo Beach KFC also bore sufficient similarity to establish robbery as the motive for Hoynes's murder and to corroborate Williams's testimony that appellant told her that the person whose throat he slashed at Redondo Beach KFC refused to give him the money. He was suspended at the time of the first theft, but retained his keys to the restaurant and safe and knew the safe's combination, thereby having access to the money. When the second theft occurred, he was the last person to close the restaurant on the evening before and the first person to work the next morning. Both thefts apparently occurred after closing, in the evening hours, and with no

evidence of forced entry. The thefts occurred from the same safe that was damaged in the incident during which Hoynes was murdered. Moreover, in an effort to keep his job, appellant offered to repay the stolen money, which Rabdau took to be a tacit admission of his guilt. There was sufficient evidence that Hoynes's murder occurred during an attempt at a third robbery in Redondo Beach KFC within a two-week period.

### 3. Evidence Code section 352

Although the evidence of appellant's other crimes is probative on the issues of identity, common scheme, motive and intent, such evidence "must not contravene other policies limiting admission, such as those contained in Evidence Code section 352." (*People v. Balcom* (1994) 7 Cal.4th 414, 426.) Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

"The weighing process under [Evidence Code] section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon mechanically automatic rules. . . . [Citation.]" (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 352.) In considering whether the probative value of uncharged crimes is outweighed by the prejudice, we must evaluate the inflammatory nature of that evidence, the degree of certainty of its commission, the probability of confusion, consumption of time, and remoteness, as well as other unique factors presented. (*People v. Harris* (1998) 60 Cal.App.4th 727, 738–740; see also *People v. Falsetta* (1999) 21 Cal.4th 903, 917.)

We cannot say that the trial court abused its discretion under Evidence Code section 352 in admitting evidence of appellant's uncharged conduct. While there was some prejudice by introducing evidence of uncharged conduct, the trial court reasonably concluded that the prejudice did not outweigh its relevance. As discussed above, that evidence had significant relevance to the issues of common design, intent and motive. The uncharged conduct was not inflammatory, particularly when compared to the

gruesome murder for which appellant was charged. Though appellant had not been convicted of the October thefts, as previously discussed, the evidence that he was the thief was strong. There was direct eyewitness evidence as to his November conduct at Fountain Valley KFC. All of the uncharged conduct occurred in the same time period as the charged offense, occurring within two weeks before and after. While the uncharged crime evidence took some time to introduce, we do not find that time inordinate in the context of this entire lengthy trial. Moreover, the crime for which appellant was being charged was murder, but the prior bad conduct was for other conduct, making it unlikely that that evidence would confuse the jury or that it would draw the conclusion that because appellant was a thief, he was also a murderer.

#### *4. Harmless error*

Even if the trial court erroneously permitted evidence of the uncharged misconduct, the error was harmless, as it is not reasonably probable that a different verdict would have occurred but for the error. (See *People v. Welch* (1999) 20 Cal.4th 701, 749-750; *People v. Watson* (1956) 46 Cal.2d 818, 836–837.) The evidence against appellant was compelling, even without considering the uncharged conduct.

The strongest evidence was Williams’s testimony recanting her alibi statement given to police on the day after the murder that appellant was with her on the night of the murder. She testified that he was not with her, and, within 10 days after, she had two conversations with him. In one, he admitted slitting Hoynes’s throat. In the other, he admitted that the foam found at the murder scene came from his boot. This evidence was consistent with and gave additional support to the forensic evidence.

The forensic evidence could not eliminate the crime scene foam as having come from appellant’s boot. The other boot had a remnant of the foam left in the collar consistent with Williams’s testimony that appellant ripped the foam out of his other boot. When appellant was arrested on November 11, 1984, he was in possession of a knife containing human antigen that had similar characteristics to the antigen on the weapon used to kill Hoynes. Appellant’s knife could not be eliminated as the murder weapon.

Also, appellant had arranged to meet Rabdau at Redondo Beach KFC on the night of the murder to pick up his briefcase and drop off his KFC uniforms. He had not arrived by the time Rabdau left, after 9:00 p.m., when the restaurant was closed. The day after the murder, appellant had a fresh cut on his finger that he falsely claimed occurred when he was helping Williams make dinner the previous night. Williams testified that appellant was not with her that night and did not assist in preparing dinner. Even when she provided the false alibi for him in 1984, she denied that he had cut his finger helping her. Appellant substantially admitted committing the October 1984 thefts at Redondo Beach KFC, when he offered to repay the stolen monies in order to keep his job. The safe had a bloodstain on it and was damaged, strongly suggesting that robbery of the same safe was the motive for the murder. Though the combination to the safe had been changed after appellant's termination, he was never told that, and may have believed, he could still gain entry.

### **III. Admission of evidence of appellant's poverty and need for money to buy drugs**

#### ***A. Background***

During the People's case-in-chief, the prosecutor called police witnesses to testify to seeing appellant purchase narcotics while he was under surveillance. Defense counsel objected that he was not provided this information in discovery, it was irrelevant, and it was inadmissible under Evidence Code section 352.

The trial court permitted the testimony, finding it relevant to show that the charged offense was a foiled robbery and that appellant required money to "feed his drug habit." The court found that its probative value outweighed its prejudice.

During closing argument, the prosecutor argued that the motive for the armed robbery and murder was appellant's poverty and need for money for his drug habit.

#### ***B. Contention***

Appellant contends that the trial court committed prejudicial error in admitting evidence of appellant's poverty and drug use. He argues that this evidence only remotely, if at all, tends to provide a motive for robbery and is substantially outweighed

by its prejudice. While we agree that the evidence was improperly admitted, we find the error to have been harmless.

### ***C. Analysis***

#### ***1. Drug use***

Evidence of a defendant's narcotics addiction is admissible where the direct object of the crime is to obtain narcotics. (See, i.e., *People v. Copeland* (1959) 169 Cal.App.2d 713, 715 [forgery of drug prescription].) It is inadmissible where it “tends only remotely or to an insignificant degree to prove a material fact in the case . . .” (*People v. Cardenas* (1982) 31 Cal.3d 897, 906), such as in cases where the object of the crime is to obtain money. (*Ibid.*; see also, i.e., *People v. Bartlett* (1967) 256 Cal.App.2d 787, 793-794 [theft of spark plugs from service station]; *People v. Davis* (1965) 233 Cal.App.2d 156, 161-162 [robbery of money from liquor store].) In the later cases, “probative value to show motive [is] far outweighed by its tendency to incite a jury to resolve the issue of guilt or innocence on [an accused's] character rather than on proof of the essential elements of the crime.” (*People v. Cardenas, supra*, at pp. 906-907.)

Here, the prosecution's evidence that was objected to did not even establish that appellant was a drug addict. It simply showed that he possibly purchased narcotics on one occasion. There is no evidence as to whether the purchase was an isolated event, whether it was made on his own behalf or for someone else or any other circumstance that would clearly establish the significance of the purchase. Thus, it is weak evidence, at best, that he was a drug addict.

Even if we assume that the evidence established that appellant was a drug addict, it was admitted to show a financial motive for the two thefts of the Redondo Beach KFC safe and the apparent attempted theft at the time of Hoynes's murder. Evidence of drug addiction only remotely suggests that appellant was involved in those crimes. There was no evidence as to the extent of any drug habit that appellant might have had (see *People v. Reid* (1982) 133 Cal.App.3d 354, 362-363), nor was there any evidence connecting those offenses to appellant's drug use. Consequently, this evidence was substantially outweighed by the stigma attached to it and its inflammatory effect on the jury.



## 2. Poverty

While appellant and the prosecutor characterized drug purchase testimony as reflecting appellant's poverty, there was little evidence as to his financial condition. Though he asked for an advance of his salary while working at Redondo Beach KFC and was unemployed after his termination, there was no evidence that he had no money or that Williams did not have money to which he might have had access. Thus, assuming he had a drug addiction, there was insufficient evidence that his financial condition required him to rob for money to support his addiction.

Even if we were to view the evidence as establishing appellant's poverty and need for money to purchase drugs, evidence of poverty or indebtedness generally is inadmissible to establish motive to commit robbery or theft. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1076; see also *People v. McDermott*, *supra*, 28 Cal.4th at p. 999.) Reliance on poverty alone as evidence of motive is deemed unfair to a defendant, and the probative value of such evidence is considered outweighed by the risk of prejudice. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1024.) As the court explained in *U.S. v. Mitchell* (9th Cir.1999) 172 F.3d 1104, "Lack of money gives a person an interest in having more. But so does desire for money, without poverty. A rich man's greed is as much a motive to steal as a poor man's poverty. Proof of either, without more, is likely to amount to a great deal of unfair prejudice with little probative value." (*Id.* at pp. 1108-1110 [reversing robbery conviction because the prosecutor introduced evidence of defendant's "impecunious financial circumstances"].) Under certain circumstances, however, evidence of poverty or indebtedness may be relevant and admissible for limited purposes, such as to refute a defendant's claim that he did not commit the robbery because he did not need the money. (*People v. Wilson* (1992) 3 Cal.4th 926, 939; *People v. Koontz*, *supra*, 27 Cal.4th at p. 1076.) This circumstance was not present here.

### ***D. Harmless error***

For the reasons discussed in part IID4, *ante*, we find the error in admitting this evidence to be harmless. Additionally, defense counsel did not object when Williams

testified that appellant was using crack cocaine at the time of Hoynes's murder. Thus, the challenged testimony was largely cumulative.

#### **IV. There was no cumulative error**

Appellant contends that even if the asserted errors were not individually sufficiently prejudicial to warrant reversal, the cumulative effect of the errors denied him his federal and state constitutional rights to a fair trial guaranteed by article I, sections 7 and 15 of the California Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. This contention is meritless.

“Lengthy criminal trials are rarely perfect, and this court will not reverse a judgment absent a clear showing of a miscarriage of justice. [Citations.]” (*People v. Hill* (1998) 17 Cal.4th 800, 844.) “Nevertheless, a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.” (*Ibid.*) Because the only error we have found did not prejudice appellant, there are no errors to cumulate.

#### **DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.